No. 80-569

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOCAL 1830 AND LOCAL 1833,
GENERAL LONGSHORE WORKERS,
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioners,

v.

ALTON J. BAILEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MEMORANDUM OF EMPLOYER RESPONDENTS IN SUPPORT OF PETITION

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STATEMENT OF INTEREST

The parties submitting this brief, Rogers Terminal & Shipping Corp., Louisiana Stevedores, Inc., Ramsay, Scarlett & Co., Inc., and Baton Rouge Marine Contractors, Inc., were defendants in the trial court and appellees in the court below. These companies operate Stevedoring Concerns in the Port of Greater Baton Rouge. For purposes of convenience they will hereinafter be referred to as "the companies" or "the employers". Locals 1830 and 1833 are parties to a deep sea collective-bargaining agreement or contract with the companies. The contract provides the terms and procedures for employment of longshore labor in the Port of Greater Baton Rouge.

Since the order of the Court of Appeals runs in terms only against the unions and deals with their structure, it has not seemed appropriate for us, as employers, to file a separate Petition for Certiorari. We file this memo-

randum, however, because of the potential consequences of the decision below on us as employers, whose concerns the Court of Appeals appears not to have considered.

STATEMENT OF THE CASE

For the purpose of this brief the companies adopt the statement of the case by petitioners.

REASONS FOR GRANTING THE WRIT

The trial court and the Court of Appeals specifically found that there was no employment discrimination shown by the plaintiff. However, the Court of Appeals then ordered a merger of the unions due to its perception that:

> "the 50%-50% hiring practice represents a threat of employment discrimination and thus violates § 2000 e-2 (c) (2) which makes it an unlawful employment practice if it would deprive or tend to deprive an individual of employment opportunities." (App. 24a)

The collective bargaining agreement provides:

> "The employer, while having the right to select his employees, agrees to cooperate with union representatives in effecting an equitable distribution of work among the available work force. A central hiring system will be established wherein work records of each employee will be maintained in order to assist the parties in distributing the available work."[1]

The primary reason for granting this writ is the fact that the decision below conflicts with the rulings of this court in at least two respects. First, the decision disregarded the basic principles of equity required in fashioning a decree under a federal statute—(*E.g. Teamsters* v. *United States*, 431 U.S. 324). Secondly, the decision disregarded the proper and traditional division of functions in the federal judicial system. (*E.g. Dayton Board of Education* v. *Brinkman*, 433 U.S. 406).

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[1] Defendants' Exhibit E-5, Article 1, Section F, Page 4.

1. The equitable considerations of fashioning a proper remedy are very important in this matter to prevent injury to the employees and employers who were found innocent of any discrimination. It is difficult to perceive any equity in the decision of the Court of Appeals. The two unions have functioned in the Port of Greater Baton Rouge since 1956. The operation of the stevedoring functions within the Port have been accomplished in an orderly and efficient manner through the cooperation of the labor unions and the employers. Then Alton Bailey files a lawsuit alleging discrimination, both Courts below find no discrimination, but, due to the *possibility* of discriminatory treatment in the failure, the Court of Appeals orders a merger of the unions. This was done without any testimony as to the effect that such a merger would have on the operation of the port and without any apparent regard for the effect it will have on the 90% of the members of Local 1830 who filed a voluntary petition stating their opposition to Bailey's lawsuit. Such action seems to subject to injury the very persons whom were meant to be protected by Title VII of the Civil Rights Act of 1964. The *Teamsters* case, *supra*, held that an equitable balance must be struck between the rights of victims and the rights of innocent nonvictims.

The stevedoring companies in this case are, on this record, and on the findings below "innocent parties" entitled to the same consideration of their equities in the fashioning of a remedy. Indeed, their equities are entitled to far greater weight than those of the employers who were found guilty of violating Title VII in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, and in *Los Angeles Water & Power Dept.* v. *Manhart*, 435 U.S. 702. Yet, whereas in *Albemarle* this Court directed the trial court to consider even that employer's equities and whereas in *Manhart* this Court itself withheld, on equitable grounds, the retroactive back pay which is presumptively available to the victims of discrimination, the Court of Appeals in this case disregarded the innocent employers' equities entirely. It directed the unions to be merged without

having any evidence (let alone findings) as to the effect that this order would have on the operations of the stevedoring companies.

A merger will require a revamping of the employment system and could well result in many practical problems in job performance by the stevedoring companies. Why should the companies be blindly subjected to such practical problems when there exists only a supposed possibility of discrimination? Would not the proper remedy have been for the Court of Appeals to refer the matter back to the trial court for a proper determination of an equitable remedy? The overwhelming majority of the members of Local 1830, some 90%, have signified that they feel that the present system is equitable. The trial court specifically found that:

> "There is not one bit of evidence in this record to support plaintiff's claim that the defendants have discriminated against the plaintiff or any other black longshoreman with regard to compensation, terms, conditions or privileges of employment nor is there one bit of evidence as to discriminatory or retaliatory discharges. There is likewise no credible evidence to support a charge that the defendants have refused to hire the plaintiff because of his litigous activities or that they have refused to accord black longshoremen equal employment opportunities." (App. 33a-34a)

The employers have found the system fair and efficient in carrying out the required work. It is submitted that their legitimate interests were not properly considered by the Court of Appeals in fashioning the remedy. Indeed, it is clear from the face of its opinion that in ordering merger the Court of Appeals simply adopted the result it had reached in *Equal Emp. Op. Comm.* v. *International Long. Assn.*, 511 F. 2d 273 (5th Cir. 1975) and *United States* v. *Jacksonville Terminal Co.*, 451 F. 2d 418 (5th Cir. 1971). There is no evidence that the factual situation presented by this case is the same as

that presented by the two prior cases—in which there were findings of actual discrimination in hiring, see 511 F. 2d at 280, and 451 F. 2d at 457. Why should these decisions (one from another port, a second from another industry) be treated as decisive of the result in this case absent findings, based on the record, that the situations are in fact the same, and where the hiring pattern has actually been shown to have operated entirely lawfully?

It is paradoxical that the Court of Appeals has failed to consider the potential impact of its order on these employers although *Albemarle* and *Manhart* required that even the equities of guilty employers be taken into account. While petitioners here have understandably emphasized the equities of the affected employees, and particularly the majority of black members of Local 1830 who object to the merger, it is the Court of Appeals' single-minded devotion to the merger result, in disregard of any and all countervailing considerations and potential harm to those affected by its order which, in the final analysis, is the true measure of that Court's striking departure from precedent and principle.

2. The jurisprudence cited by the Petition establishes the principle that the remedy for a violation of a statute must be fashioned to fit the particular case presented and the fashioning of this remedy should be offered first to the trial court. (*E.g.*, *Albemarle Paper Co.* v. *Moody*, *supra*).

If the finding of possible future discrimination is correct, there are several possible remedies other than merger. For example, the collective bargaining agreement provides that the employers and the union shall cooperate to effect an equitable distribution of work among the available work force. A formula could be provided which would allocate available employment among the work force based upon the current membership in the locals or the makeup of the work force. This formula could be revised regularly to reflect any changes. The Court is reminded that there has been no finding that the distri-

bution of the work is not done is an equitable manner, only a finding that there is a *possibility* that it could be distributed in a discriminatory manner in the future. Conversely, there was no showing that the ordered merger would correct the supposed possible problem.

The record and the decision of both the trial court and Court of Appeals recognized that the employers were guilty of no discrimination in this case. The past history of the companies and hiring in the port reflect the non-discriminatory nature of the system. The companies certainly would not condone any violation, real or possible, of Title VII. However, it is respectfully submitted that there are remedies other than merger available to correct any supposed possible problems. Such remedies however, should be formulated by the trial court only after a full hearing on the equities and practicalities of the matter.

CONCLUSION

For the foregoing reasons, as well as the reasons presented by counsel for petitioners, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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